BRB No. 06-0147
and 06-0509

ALANE JOY LEE (Widow of THOMAS E. LEE) Claimant-Petitioner v. BATH IRON WORKS CORPORATION and ONEBEACON INSURANCE Employer/Carrier- Respondents	)	DATE ISSUED: 02/28/2007 DECISION and ORDER

Appeals of the Decision and Order Granting Summary Decision and Denying Benefits, the Order Denying Petition for Reconsideration and the Decision and Order Denying Modification of Larry Price, Administrative Law Judge, United States Department of Labor.

Alane Joy Lee, Lee, Maine, *pro se.*

Richard F. van Antwerp (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Summary Decision and Denying Benefits, the Order Denying Petition for Reconsideration and the Decision and Order Denying Modification (2005-LHC-1625 and 2005-LHC-1626) of Administrative Law Judge Larry Price rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's decision

to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant and her deceased husband Thomas E. Lee (decedent) were both employed by employer from 1978 to February 1981; claimant, who has been *pro se* at all times, seeks death benefits under the Act as the widow of decedent and additionally seeks compensation under the Act for her own disability. Specifically, claimant alleges that decedent's death from pancreatic cancer on June 14, 1982, resulted from radiation and lead exposure sustained in the course of his employment as an electrician with employer when a megatron firing device (or radar unit) malfunctioned.[1] Claimant additionally claims disability benefits for her mental illness, which she asserts is causally related to decedent's work-related injury and death and to her own work-related stresses as a clerk with employer, and for her respiratory problems, which she alleges arise out of her employment with employer. Employer's employment records reflect that both decedent and claimant left its employment in February 1981 for other employment.

In a letter to employer's claims manager dated October 11, 2000, claimant notified employer of her husband's death and asserted a "wrongful death claim" arising out of decedent's alleged work-related accident. Claimant additionally notified employer of her own disability due to mental illness, stating that she had previously been unable to claim her legal rights due to her emotional disability and lack of knowledge of her legal rights. In a subsequent letter to employer dated June 4, 2001, claimant again asserted that decedent's death was causally related to his employment with employer. She further stated that her own mental illness was caused by stress in her own employment with employer and by her husband's work-related illness. She additionally advised employer that she suffers from chronic bronchitis and asthma which she attributed to dust and suspected asbestos exposure experienced while in the course of her employment with employer.

The record before the Board does not disclose when claimant first notified the Office of Workers' Compensation Programs (OWCP) of decedent's and her alleged work-related injuries. In letters dated August 25, 2004, the district director notified claimant that employer had controverted her right to compensation for both reported

[1] Claimant alleges that the malfunctioning radar unit was located onboard the U.S.S. *Sims*, a Navy vessel which was overhauled at employer's shipyard between February 15, 1979, and March 31, 1980.

injuries.[2] In a letter to the OWCP dated September 3, 2004, claimant stated that she was formally requesting adjudication of her claims for death benefits and for disability benefits for her own mental illness and bronchial condition. Claimant's formal Claim for Death Benefits (LS-262) was filed on October 13, 2004. An informal conference was held on March 31, 2005, during which employer raised late notice and the statute of limitations as two of its several defenses. The Memorandum of Informal Conference states, without explanation, that the claim was filed with the OWCP on September 8, 2004. The memorandum, however, references only the OWCP number for the death claim and discusses only that claim; it is unclear whether claimant's disability claim was also the subject of the informal conference.

Thereafter, both claims were referred to the Office of Administrative Law Judges (OALJ).[3] On August 26, 2005, employer filed a Motion for Summary Decision, requesting that the claims be denied as untimely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a).[4] Specifically, employer asserted that claimant developed a subjective perception of potential claims under the Act no later than October 11, 2000, that claimant notified the OWCP of her claims on September 8, 2004, and that employer's failure to file a first report of injury does not toll the statute of limitations pursuant to Section 30(f), 33 U.S.C. §930(f), since employer had no knowledge of an alleged work-related injury until after the limitations period had expired. On September 2, 2005, claimant filed an objection to employer's motion for summary decision.

[2] Claimant also filed claims for workers' compensation with the state of Maine on June 3, 2004; copies of these state claims were received by OWCP on October 25, 2004.

[3] The administrative law judge's decision references both claim numbers and describes facts relevant to the death claim and claimant's mental stress claim. There is no discussion of the alleged respiratory illness.

[4] In a Notice of Hearing/Pre-Hearing Order dated May 25, 2005, Administrative Law Judge Colleen A. Geraghty stated that a hearing was scheduled for the week of October 5, 2005, and that motions for summary decision must be filed no later than 60 days before the hearing week. Following reassignment of the case to Administrative Law Judge Larry Price, a new Notice of Hearing/Pre-Hearing Order was issued on August 15, 2005, which set the hearing for October 4, 2005, and made no specific mention of motions for summary decision. After a telephone conference, an Order dated August 18, 2005 stated that employer had complied with claimant's discovery requests by providing claimant with all the relevant materials in its possession and ordered that any dispositive motions be filed by August 26, 2005.

The administrative law judge granted employer's motion for summary decision, finding several facts to be undisputed based upon the briefs and supporting evidence submitted by the parties. Specifically, the administrative law judge first found, citing the Memorandum of Informal Conference, that the claims for death and disability benefits were filed on September 8, 2004.[5] Next, he found that in October 2000, claimant was aware of the relationship between decedent's injury/death and his employment with employer and of the relationship between her injury and her employment with employer.[6] The administrative law judge determined that the tolling provisions of Section 13(c), 33 U.S.C. §913(c), do not apply as no evidence was presented that claimant was mentally incompetent at any time after October 2000. Lastly, the administrative law judge found that the tolling provisions of Section 30(f), 33 U.S.C. §913(f), do not apply because employer was unaware of the alleged accident until over twenty years had elapsed. The administrative law judge therefore granted employer's motion and denied the claim as untimely filed.

In an Order Denying Petition for Reconsideration, the administrative law judge affirmed his finding that none of claimant's prior letters to other government offices constituted the filing of a claim under the Act as they do not include a demand for compensation and were not filed with the district director; he further found that these letters support his finding that claimant possessed the requisite awareness of a relationship between decedent's death and his employment with employer and claimant's injury and her employment with employer as early as October 2000. The administrative law judge also affirmed his finding that Section 13(c) does not toll the statute of limitations, concluding that there is no evidence that claimant had a level of incompetence that rendered her unable to file a compensation claim.

After appealing the administrative law judge's Decision and Order and Order Denying Petition for Reconsideration to the Board, BRB No. 06-0147, claimant filed a modification request accompanied by additional documents. By Order dated January 19, 2006, the Board dismissed claimant's appeal and remanded the case for modification

[5] The administrative law judge found that none of claimant's prior communications with other government offices constitutes the filing of a claim under the Act because they did not include a demand for compensation and were not filed with the district director in the appropriate compensation district as required by Section 13(a) of the Act, 33 U.S.C. §913(a).

[6] The administrative law judge set forth the provisions of both subsections (a) and (b) of Section 13 of the Act, 33 U.S.C. §913(a), (b), but he did not specify which subsection is applicable to claimant's claims. Decision and Order Granting Summary Decision at 3.

proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922. In a Decision and Order Denying Modification, the administrative law judge, having found that claimant's newly-submitted evidence supported his previous findings, determined that no grounds exist for modification of his previous decisions; the administrative law judge additionally stated that new evidence regarding claimant's pulmonary condition is not relevant as that alleged injury was not before him.

Claimant appealed the administrative law judge's denial of modification to the Board, and additionally requested that her prior appeal, BRB No. 06-0147, be reinstated. By Order dated April 26, 2006, the Board reinstated claimant's previous appeal, BRB No. 06-0147, acknowledged claimant's appeal of the administrative law judge's modification denial, BRB No. 06-0509, and consolidated the two appeals for purposes of rendering a decision. On appeal, claimant challenges the administrative law judge's denial of her claims as untimely. Employer responds, urging affirmance of the administrative law judge's decisions.[7]

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. §18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* When a motion for summary decision is supported by affidavits, "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision. 29 C.F.R. §§18.40(d), 18.41(a).

[7] In addition, both claimant and employer have filed motions with the Board. We grant employer's motion for an extension of time in which to file a response brief and hereby accept employer's response brief. 20 C.F.R. §§802.211, 802.217. Claimant has filed a motion to allow new evidence and employer has moved to exclude evidence submitted by claimant which was not included in the record before the administrative law judge. As the Board is not permitted to consider evidence which was not part of the record before the administrative law judge, we deny claimant's request to submit new evidence and grant employer's motion to exclude claimant's new evidence. 20 C.F.R. §802.301. Claimant also has submitted a copy of the transcript of a hearing before the Maine Workers' Compensation Board; employer has objected to the inclusion of this transcript in the record before the Board. As this transcript was not part of the record before the administrative law judge, it cannot be considered by the Board and, along with the other new evidence submitted by claimant, is being returned to claimant. *Id.*

In determining whether to grant a motion for summary decision, the fact-finder must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary judgment as a matter of law. *See generally Han v. Mobil Oil Corp.,* 73 F.3d 872 (9th Cir. 1995). In addition, the trier-of-fact must draw all inferences in favor of the non-moving party. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors***,** 809 F.2d 626 (9th Cir. 1987); *see also O'Hara v. Weeks Marine,* 294 F.3d 55, 61 (2d Cir. 2002). If a rational trier-of-fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of an issue of fact that is both material and genuine. A "material fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." *T.W. Elec. Service,* 809 F.2d at 630**.** The genuineness of the issue of fact cannot be shown merely by statements of the non-moving party that it will discredit the moving party's evidence at trial. Rather, that party must produce at least some "significant probative evidence tending to support" her claim. *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

Under these standards, the administrative law judge's decision to grant employer's motion for summary decision cannot be affirmed, and the case must be remanded for reconsideration. The administrative law judge found, on the basis of the parties' pleadings and supporting evidence, that there were undisputed facts that established that the claims were untimely, thus warranting a summary decision denying the claims. The administrative law judge, however, did not apply the correct legal standards in addressing Section 30(a), (f) of the Act, 33 U.S.C. §930(a), (f). Where an administrative law judge applies the law incorrectly, his decision to grant summary decision cannot stand. *See Han,* 73 F.3d 872; *Morgan v. Cascade General, Inc.,* 40 BRBS 9, 12 (2006). Although the administrative law judge's ultimate conclusion that the claims were not timely filed must be vacated and the case remanded, we affirm the findings of the administrative law judge in other respects.[8]

[8] Initially, we reject claimant's contention that the administrative law judge erred in not denying employer's Motion for Summary Decision on the basis that it was not filed at least 60 days before the hearing pursuant to the May 25, 2005 Pre-Hearing Order. The subsequent August 16, 2005 Pre-Hearing Order and August 18, 2005 Order stating that "dispositive motions" must be filed by August 26, 2005, however, superseded the original Pre-Hearing Order. Moreover, the OALJ regulations provide that motions for summary decision must be filed at least 20 days prior to the hearing. 29 C.F.R. §18.40(a). Here, employer's motion was filed more than 20 days prior to the scheduled

Section 13(a) requires that a claim for disability or death benefits be filed within one year after the injury or death. The time for filing does not begin until the claimant is "aware, or by the exercise of reasonable diligence should have been aware, of the relationship between" the injury or death and the employment. 33 U.S.C. §913(a). In a claim based on an occupational disease "which does not immediately result in disability or death," a claim for compensation "shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, . . ." 33 U.S.C. §913(b)(2). Section 20(b) of the Act, 33 U.S.C. §920(b), provides a presumption that a claim was timely filed, "in the absence of substantial evidence to the contrary." *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *see also Bath Iron Works Corp. v. U.S. Dept. of Labor [Knight]*, 336 F.3d 51, 57, 37 BRBS 67, 70-71(CRT) (1st Cir. 2003); *Morgan,* 40 BRBS at 11.

In the instant case, the administrative law judge found that by October 2000, claimant was aware of the relationships between decedent's injury/death and his employment and between her own injury and her employment with employer. *See* Decision and Order Granting Summary Decision at 3. A finding regarding the claimant's date of awareness may be based on her personal opinion that there is a relationship between the injury, employment and disability. *See Wendler v. American Nat'l Red Cross*, 23 BRBS 408 (1990) (McGranery, J., concurring and dissenting). In the instant case, claimant's October 11, 2000 letter to employer reflects her personal opinion regarding the relationship between decedent's injury/death and his employment and, thus, supports the administrative law judge's finding that claimant possessed the requisite awareness of such a relationship as of October 2000.[9] In her response to employer's

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hearing and by the date set in the administrative law judge's August 18, 2005, Order for the filing of dispositive motions.

We further reject claimant's contention that the administrative law judge erroneously deprived her of the opportunity to conduct necessary discovery. The administrative law judge acted within his discretion in ruling that employer had provided claimant with all the relevant materials in its possession. *See* Order dated August 18, 2005; *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993).

[9] Although the record does not reflect an awareness on the part of claimant of the relationship between her mental illness and respiratory problems and her own employment with employer until her June 4, 2001 letter to employer, any error by the administrative law judge in finding that claimant's date of awareness regarding her disability claim was October 2000 rather than June 2001 is harmless as the difference in

Motion for Summary Decision, claimant did not produce probative evidence sufficient to establish the existence of genuine issue of material fact regarding the date of claimant's awareness. *See generally Buck v. General Dynamics Corp./Electric Boat Corp.*, 37 BRBS 53, 55 (2003). We therefore affirm the administrative law judge's determination that claimant's date of awareness was October 2000.

We also affirm the administrative law judge's finding that the statute of limitations was not tolled by Section 13(c), 33 U.S.C. §913(c), of the Act.[10] The administrative law judge found, in this regard, that there is no evidence that claimant was mentally incompetent at any time after October 2000, Decision and Order Granting Summary Decision at 3, or that claimant had a level of incompetence that rendered her unable to file a compensation claim. Order on Recon. at 2. The relevant time period concerning claimant's mental competence is after October 2000, her date of awareness. As claimant presented no medical evidence regarding her mental condition during any period of time after October 2000, she did not raise the existence of a material and genuine fact with respect to the applicability of Section 13(c). *See generally Buck*, 37 BRBS at 55.

We are unable to affirm, however, the administrative law judge's determination that the tolling provision of Section 30(f) of the Act, 33 U.S.C. §930(f), is inapplicable to this case. Section 30(f) provides that where an employer has been given notice or has knowledge of any injury and fails to file a timely first report of injury under Section 30(a) of the Act, 33 U.S.C. §930(a), the limitations periods set forth in Section 13(a) and (b)(2) do not begin to run until such report has been filed. *See Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999), *rev'g in pert. part* 32 BRBS 174 (1998); *Stark*, 833 F.2d at 1028, 20 BRBS at 44(CRT); *Morgan*, 40 BRBS at 11; *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15, 17 (1999). Thus, for Section 30(a) to apply, the employer or its agent must have notice of the injury or knowledge of the injury and its

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the two dates would not change the result with respect to the timeliness of claimant's disability claim.

[10] Section 13(c) states:

> If a person who is entitled to compensation under this chapter is mentally incompetent . . ., the provisions of subdivision (a) of this section shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent . . . from the date of appointment of such guardian or other representative, . . .

33 U.S.C. §913(c).

work-relatedness; the employer may overcome the Section 20(b) presumption that the claim was timely filed by presenting substantial evidence that it did not receive notice or have knowledge of the work-related injury or death. *See Blanding,* 186 F.3d 232, 33 BRBS 114(CRT); *Morgan,* 40 BRBS at 11; *Bustillo,* 33 BRBS at 17-18; *see also Stark,* 833 F.2d 1025, 20 BRBS 40(CRT). Knowledge of the work-relatedness of an injury may be imputed where employer knows of the injury and has facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation is warranted. *See Stark,* 833 F.2d at 1028, 20 BRBS at 44(CRT); *Bustillo,* 33 BRBS at 18. An employer's failure to file a Section 30(a) injury report will not toll the limitations period under Section 30(f) where the employer establishes that it did not receive notice or obtain knowledge of the work-related injury by the end of the relevant filing period. *See Stark,* 833 F.2d 1025, 20 BRBS 40(CRT); *Wendler,* 23 BRBS at 413.

In its Motion for Summary Decision, employer cited *Wendler,* 23 BRBS 408, in support of its assertion that its failure to file a Section 30(a) injury report did not toll the statute of limitations pursuant to Section 30(f). The administrative law judge concluded that the Section 30(f) tolling provision is inapplicable because the alleged accident was not reported and employer had no awareness of it until over twenty years after the alleged accident. This conclusion cannot be affirmed, as the administrative law judge erred in relying on the time which has elapsed since decedent's alleged accident. The issue is whether employer received notice or gained knowledge of the alleged injuries during the relevant filing period, *i.e.,* after claimant became aware of the relationship between decedent's death and her disability and the employment. *Id.* Thus, the period prior to claimant's awareness is not relevant as the statutory period had not commenced. Because the administrative law judge's only rationale cannot be affirmed, his conclusion regarding Section 30(f) must be vacated and the case remanded.

On remand, the administrative law judge must reconsider whether employer gained knowledge during the statutory filing period after claimant's October 2000 date of awareness. Employer's reliance on *Wendler,* 23 BRBS at 413, is misplaced. In *Wendler,* the administrative law judge found that claimant possessed the requisite awareness by May 1983 but did not file her claim until June 1985. There was no evidence of any communication between the claimant and the employer until the date her claim was filed. The Board held that Section 30(f) did not toll the claim where the claimant had the requisite awareness under Section 13(b) over two years before the employer was given notice of the alleged injury. Thus, in *Wendler,* the statutory filing period after the date of awareness had lapsed before employer gained knowledge. In the instant case, however, claimant's date of awareness was based on her October 11, 2000, letter to employer. This letter, as well as claimant's subsequent letters to employer, may be sufficient to provide employer with knowledge of the alleged injuries for Section 30 purposes. *See Stark,* 833 F.2d at 1028, 20 BRBS at 44(CRT); *Bustillo,* 33 BRBS at 18. As previously discussed, it is employer's burden under Section 20(b) to establish that it did not have notice or

knowledge of the work-related injury or death. *See Blanding,* 186 F.3d at 236, 33 BRBS at 117(CRT).

In the instant case, the administrative law judge did not consider whether claimant's October 11, 2000, letter or her subsequent letters to employer were sufficient to provide employer with knowledge of the alleged work-related injuries pursuant to Section 30(a). Thus, we must vacate the administrative law judge's decision granting summary decision and remand the case for the administrative law judge to make such a determination. *See Knight,* 336 F.3d at 57, 37 BRBS at 70-71(CRT); *Blanding,* 186 F.3d at 236, 33 BRBS at 117(CRT); *Stark,* 833 F.2d at 1028, 20 BRBS at 44(CRT); *Bustillo,* 33 BRBS 18. If, on remand, the administrative law judge finds that claimant's letters provided employer with knowledge for purposes of Section 30(a), the relevant limitations periods[11] would be tolled by Section 30(f) until an injury report was filed by employer.[12] *See Blanding,* 186 F.3d 232, 33 BRBS 114(CRT); *Stark,* 833 F.2d at 1028, 20 BRBS at 44(CRT); *Morgan,* 40 BRBS at 11; *Bustillo,* 33 BRBS at 17. If the evidence presented by the parties with respect to employer's Motion for Summary Decision is insufficient for a resolution of the Section 30(f) issue, the administrative law judge must hold an evidentiary hearing on the issue of the timeliness of claimant's claim and on any other issues raised by the parties. 33 U.S.C. §919(d); 20 C.F.R. §702.331 *et seq.; see Morgan,* 40 BRBS at 3; *Dunn v. Lockheed Martin Corp.,* 33 BRBS 204 (1999).

Lastly, we briefly address claimant's assignment of error to the administrative law judge's denial of her request for modification. Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in

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[11] On remand, the administrative law judge should state whether the claims are governed by Section 13(a) or (b). Additionally, the administrative law judge should explain his finding that the claims were filed on September 8, 2004, and state which of claimant's communications with the district director establishes the filing date. In this regard, we affirm the administrative law judge's finding that none of claimant's letters to other government offices constituted the filing of claims because the letters were not filed with the district director. *See* 33 U.S.C. §913(a); 20 C.F.R. §702.221(a); *Manship v. Norfolk & W. Ry Co.,* 30 BRBS 175, 178 (1996).

[12] Employer appears to concede that it did not file a Section 30(a) report, as it argues that its failure to file this report is irrelevant because the claims were already time-barred by the time employer received claimant's October 11, 2000 letter. *See* Emp. Resp. Br. at 8. Employer's argument, however, is legally incorrect; the statute of limitations could not begin to run until the date of claimant's awareness in October 2000, as claimant cannot give notice of an injury until she is aware of it.

claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968).

The administrative law judge in the instant case found that the additional evidence submitted by claimant under Section 22 did not support modification of his previous findings with respect to the timeliness of the claims. Because we have vacated the administrative law judge's conclusion that the claims were not tolled by Section 30(f), we also vacate the administrative law judge's denial of modification.[13]

Accordingly, we affirm the administrative law judge's finding that claimant's date of awareness was in October 2000. However, we vacate his finding that the claims for death and disability benefits are barred by Section 13, and remand the case for further consideration consistent with this decision.

SO ORDERED.

[13] The administrative law judge declined to accept claimant's new evidence regarding her respiratory condition, stating that this claim was not before him. Decision and Order Denying Modification, n.1. The *pro se* claimant, however, raises this condition as part of her claim for disability benefits, and the administrative law judge addressed this claim insofar as it involves alleged mental stress. The administrative law judge must determine whether the claim before him includes claimant's alleged work-related pulmonary condition; if he finds that such a claim is not before him, he must determine its status.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge